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John H. Blume

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AN INTRODUCTION TO POST-CONVICTION REMEDIES, PRACTICE AND PROCEDURE IN SOUTH CAROLINA

JOHN H. BLUME*

* Executive Director, South Carolina Death Penalty Resource Center. B.A., University of North Carolina, Chapel Hill 1978; M.A.R., Yale University 1982; J.D., Yale University 1984.

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I. INTRODUCTION

The purpose of this article is to discuss various aspects of an inmate's available post-conviction remedies in South Carolina. Very little has been written about this topic, perhaps because post-conviction is considered by many to be the "redheaded stepchild of the legal system."[1] Despite the importance of post-conviction remedies as a safeguard against unjust, unconstitutional, and erroneous confinements,[2] this systemic devaluing of the importance of the post-conviction process is widespread. Convicted persons in South Carolina raising post-conviction challenges rely almost exclusively on appointed counsel, most of whom have little experience in this area of the law.[3] Counsels' enthusiasm for the cases also varies widely, but many

1. Vance L. Cowden, *Indigent Defense Services for Post-Conviction Relief in South Carolina: Current Problems and Potential Remedies,* 42 S.C. L. REV. 417, 420 (1991).

2. *See, e.g.*, Butler v. State, 302 S.C. 466, 397 S.E.2d 87, *cert. denied*, 498 U.S. 972 (1990).

3. Almost all incarcerated persons are indigent and thus cannot afford to retain counsel. Furthermore, in the majority of cases, the public defender represented the inmate at the initial trial or plea. In those cases, the public defender's office has a conflict of interest because the quality of the representation must be reviewed; therefore, this conflict prevents the public defender from being involved in the post-conviction process and requires the appointment of

appointed lawyers devote little time to investigating available grounds for relief and in preparing the cases for trial.[4] This is especially unfortunate because, in most cases, the state post-conviction process will be the inmate's last chance to raise any additional challenges to his conviction or sentence.[5] This article will outline the law, practice, and procedure surrounding the pursuit of post-conviction remedies in South Carolina.[6] While a systematic discussion of the tactical considerations that play a critical role in successful post-conviction representation is beyond the scope of the article, it will address some of these concerns. Similarly, this article will not attempt a detailed discussion of the panoply of substantive claims that one can raise in post-conviction proceedings.[7] Rather, this article is written primarily to give to lawyers representing inmates seeking post-conviction relief, and to provide inmates proceeding *pro se*, an overview of the mechanisms of the various post-conviction remedies available in South Carolina. The information should also prove useful to members of the judiciary, their clerks, and others involved directly or

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private practitioners. Because the state does not compensate court appointed counsel in post-conviction proceedings, and very few inmates have the financial means to hire an attorney, an established post-conviction bar does not exist in South Carolina. Thus, it is usually "amateur hour" for the inmate, while attorneys who specialize in post-conviction work represent the state.

4. This is not meant to disparage appointed counsel, a number of whom do an excellent job. However, in many cases, appointed counsel devote only a few hours to preparing a post-conviction case, and may not even meet with the inmate until the week of the evidentiary hearing. *See* Cowden, *supra* note 1, at 432-33.

In many instances this lack of preparation is not the appointed counsel's fault. As Professor Cowden noted in his study, in some counties counsel is not appointed until shortly before the hearing. *Id.* at 432. In other cases, appointed counsel do little investigation because they do not know what issues are cognizable, and because of a lack of funds to conduct needed investigation.

5. The state process becomes the inmate's last chance for a variety of reasons, the most significant being the "exhaustion" doctrine. To raise a claim in federal habeas corpus, a prisoner must first have presented the substance of the claim to the state courts and must have exhausted available state remedies. *See* Rose v. Lundy, 455 U.S. 509, 515 (1982).

The pleading consequences of the exhaustion doctrine will be discussed later in this article. *See infra* notes 116-20 and accompanying text. Throughout this article, there will be discussion of the interplay between state post-conviction remedies and federal habeas corpus. Any systematic discussion of an inmate's federal remedies is beyond the scope of this article, but an excellent treatise on this subject is JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988 & Supp. 1993).

6. There are three basic post-conviction remedies in South Carolina: (1) the Uniform Post-Conviction Procedure Act (UPCPA), §§ 17-27-10 to -120 (Law. Co-op. 1985); (2) state habeas corpus; and (3) motions for new trial based upon after-discovered evidence. Of these three, the UPCPA has been the more important in recent years, although the other two remain viable remedies. This article discusses each procedure, but emphasizes the UPCPA because it is the most commonly utilized procedure.

7. The article mentions some of the substantive post-conviction issues. For an extensive listing of a variety of substantive claims, see LIEBMAN, *supra* note 5, at 709-36. Chief Deputy Attorney General Donald J. Zelenka has maintained a summary of available post-conviction claims in South Carolina which he will provide to appointed counsel.

indirectly in this aspect of the judicial process.

II. A BRIEF HISTORICAL PERSPECTIVE

South Carolina's post-conviction relief act came into existence in 1969.[8] Prior to 1969, post-conviction remedies, mostly via state habeas corpus, were available for certain types of claims.[9] This article begins with a brief recitation of the development of the various remedies because the history is important in delimiting the substance and procedure of modern practice.

The history of post-conviction relief divides conveniently into three periods. The first period began in colonial times with the arrival of the writ of habeas corpus and lasted at least until the 1930s. For these 250 years, habeas corpus was available only on narrow jurisdictional grounds. The 1930s marked the beginning of the expansion of the writ, so that it served as a remedy not only for jurisdictional errors, but also for violations of constitutional rights. This period of rapid expansion continued in South Carolina until 1969, when the General Assembly passed the Uniform Post-Conviction Procedure Act.[10] Since then, most collateral attacks by South Carolina prisoners in state court have employed the form of the UPCA.

A. Colonial Times to the 1930s

The writ of habeas corpus is among the most venerable doctrines of the English law, dating back at least to the time of the Magna Carta.[11] Therefore, it is no surprise that along with much of English law, the writ followed the colonists to America despite some opposition by the Crown.[12] South Carolina stands out as an early champion of the writ by being the only colony to have a codified habeas statute at the time of the revolution.[13] Furthermore, South Carolina's Charles Pinckney proposed at the Constitutional

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8. Act. No. 164, 1969 S.C. Acts 158.

9. A common law *coram nobis* remedy was also available. *See, e.g.*, State v. Liles, 246 S.C. 59, 142 S.E.2d 433 (1965). The principal function of *coram nobis* was

> to afford the Court an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered and which could not have been presented by a motion for a new trial, appeal or other existing proceeding. It lies for an error of fact not apparent on the record, not attributable to the [defendant's] negligence, and which if known by the Court would have prevented rendition of the judgment.

Id. at 73, 142 S.E.2d at 440.

10. Act. No. 164, 1969 S.C. Acts 158.

11. LARRY W. YACKLE, POSTCONVICTION REMEDIES § 4, at 7 (1981 & Supp. 1993).

12. *Id.* at 12-13.

13. *Id.* at 13; *see* Act of Dec. 12, 1712, 2 S.C. Stat. 399 (Cooper 1837); Dallin H. Oaks, *Habeas Corpus in the States - 1776-1865*, 32 U. CHI. L. REV. 243, 251 (1965).

Convention that the Constitution protect habeas corpus against all infringements, and he led the state's delegation in deciding to vote against the clause adopted by the Convention, on the grounds that it allowed the writ to be suspended in times of rebellion or emergency.[14]

From their inception, South Carolina courts have recognized two distinct times when a prisoner may invoke the writ of habeas corpus. The first circumstance is before trial by a prisoner who seeks release on bail.[15] The second opportunity comes after trial by a prisoner seeking review of a conviction[16] or sentence.[17] This article focuses on the post-conviction use of the writ.

Although habeas corpus has a long history, one should not conclude that nineteenth century judges liked the writ any more than contemporary judges. To the contrary, complaints about its abuse colored the pages of the early reporters. For instance, in *State v. Potter*[18] the court noted that "there does seem to be a popular misapprehension in relation to [the writ], indicating a belief that the *habeas corpus* Act is a sort of universal relief law—a summary general jail delivery."[19] Additionally, in *Ex parte Gilchrist*[20] the court expressed its frustration with a meritless appeal in a more hysterical manner, stating that the object of the Habeas Corpus Act was to "secure citizen from illegal and arbitrary imprisonment; and the wildest speculations have never yet carried it so far as to subvert all law and order."[21]

In its nineteenth century form, the writ offered a remedy only in a narrow category of cases—those in which the court that rendered judgment lacked jurisdiction over the defendant or the subject matter of the charge.[22] Therefore, habeas corpus was a remedy only when the judgment of the court was "void," but not when the judgment was merely "voidable."[23] The coherence of this distinction depended on the court's ability to distinguish situations in which the judgment of the court had no legal effect, from

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14. Oaks, *supra* note 13, at 248. *See generally* U.S. CONST. art. I, § 9, cl. 2 (providing that the writ of habeas corpus can be suspended in times of rebellion or invasion).

15. *See* Parsons v. State, 289 S.C. 542, 347 S.E.2d 504 (1986); State v. Fasket, 39 S.C.L. (5 Rich.) 255 (1852).

16. *See* State v. Higgins, 51 S.C. 51, 28 S.E. 15 (1897).

17. *See Ex parte* Nixon, 2 S.C. 4 (1870).

18. 23 S.C.L. (Dud.) 296 (1838).

19. *Id.* at 299.

20. 15 S.C.L. (4 McCord) 233 (1827).

21. *Id.* at 235.

22. *See* State v. Garlington, 56 S.C. 413, 414, 34 S.E. 689, 689 (1900) (per curiam) (citing *Ex parte* Bond, 9 S.C. 80, 81 (1877)).

23. *Ex parte* Bond, 9 S.C. at 80-81; *see also State v. Lundy*, 19 S.C. 601 (1883) (refusing habeas corpus because the judgment was voidable on appeal); *Ex parte* Keeler, 45 S.C. 537, 542, 23 S.E. 865, 866 (1896) (recognizing that habeas corpus is not a substitute for the right of appeal).

situations in which the court's judgment, although wrong, was rendered pursuant to legitimate authority.

The task of the habeas court in this scheme consists in distinguishing those errors that deprived the trial court of jurisdiction from those that did not. Sometimes, the test proved easy to apply. In *Gilliam v. McJunkin*[24] the South Carolina Supreme Court affirmed the circuit court's grant of the writ when the petitioner had been convicted of contempt and imprisoned by an order of the probate judge.[25] The court found that the jurisdiction of a probate judge did not extend to this type of action.[26] In other cases, the court's resolution of the issue seems less satisfactory. For example, in *Ex parte Bond*[27] the court found that the petitioner's claim that he should have been confined in the county jail rather than in the state penitentiary was an error remediable only by appeal.[28]

This scheme of distinguishing the trial court's errors seems unresponsive to claims of constitutional violations. Nevertheless, by the beginning of the twentieth century, the court's habeas corpus jurisprudence evolved to granting habeas corpus to petitioners whose claims rested on an interpretation of the Constitution. The court had not abandoned the jurisdictional analysis of habeas; rather, it recognized that some constitutional violations deprived a trial court of jurisdiction. Thus, in *Ex parte Hollman*[29] the court held unconstitutional a statute that made it a crime for a sharecropper to breach a contract to perform work on a farm.[30] The *Hollman* court reasoned that because an unconstitutional statute is void and not law, no court has jurisdiction to convict under such a statute.[31]

Donald Wilkes suggests that the courts limited this early recognition of the cognizability of constitutional claims in habeas to cases in which the petitioner complained of an unconstitutional statute because only then was the jurisdiction of the court implicated.[32] Thus, when the constitutional breach in question was of a non-statutory character—such as a breach of the right to be free from unreasonable searches—the writ would not issue because the jurisdiction of the court was not implicated.[33]

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24. 2 S.C. 442 (1871).

25. *Id.* at 450-51.

26. *Id.* at 450.

27. 9 S.C. 80 (1877).

28. *Id.* at 91-82; *cf. State v. Lundy*, 19 S.C. 601 (1883) (holding that because the lower court had jurisdiction, the judgment was only voidable on appeal).

29. 79 S.C. 9, 60 S.E. 19 (1908).

30. *Id.* at 11-12, 25-26, 60 S.E. at 20-21, 26.

31. *Id.* at 11, 60 S.E. at 20.

32. DONALD E. WILKES, JR., FEDERAL AND STATE POST-CONVICTION REMEDIES AND RELIEF 107 (1992).

33. *Id.*

As for the development of the procedures of habeas corpus, one early case deserves mention. In *Ex parte Reed*[34] the court noted that the findings of fact by a circuit judge in a habeas case are decisive, and only questions of law are reviewable.[35] In retrospect, this rule was not as harsh as it may seem because at that time every habeas case involved the same fundamental question of law: Did the court have jurisdiction? Indeed, the fact that this procedural rule was relaxed over time[36] is evidence of the expansion of the substantive grounds of habeas relief beyond the merely jurisdictional.

B. The Mid-Century Expansion of Habeas Corpus

In the 1930s, the United States Supreme Court began to expand the availability of federal habeas corpus to state prisoners. Early in this period, the Court abandoned the rule that a state conviction had to be void for lack of jurisdiction for federal habeas relief to be available.[37] Among the additional grounds for federal habeas recognized by the Court in the subsequent years were violations of both the Due Process[38] and Equal Protection Clauses.[39] These decisions presented the states with the choice of either expanding the availability of their own post-conviction remedies, or allowing the federal courts to decide which state prisoners received post-conviction relief. Predictably, most states chose to maintain control by expanding the scope of available state collateral remedies.

South Carolina lagged behind many other states in expanding state post-conviction remedies, but nevertheless did gradually enlarge the scope of habeas.[40] However, the first expansion in the availability of state habeas corpus did not purport to protect any constitutional rights. Rather, the court simply redefined the concept of "jurisdiction." For example, a court that exceeded the maximum sentence allowed by law did not commit a "mere error," but exceeded the authority of its jurisdiction.[41] The court again

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34. 19 S.C. 604 (1883).

35. *Id.* at 604-05.

36. *Cf.* Ross v. State, 250 S.C. 442, 445-46, 158 S.E.2d 647, 648 (1967) (recognizing review of material issues of fact by the appellate court).

37. Waley v. Johnston, 316 U.S. 101 (1942). *See generally* WILKES, *supra* note 32 at 97-102, 112-24 (discussing the Court's abandonment of the rule); YACKLE, *supra* note 11, § 5 (discussing the expansion of the scope of federal habeas corpus).

38. Irvin v. Dowd, 366 U.S. 717 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Brown v. Allen, 344 U.S. 443 (1953); *Ex parte* Hawk, 321 U.S. 114 (1944).

39. Brown v. Allen, 344 U.S. 443 (1953); Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951).

40. WILKES, *supra* note 32, at 113, 115.

41. Medlock v. Spearman, 185 S.C. 296, 194 S.E. 21 (1937); *Ex parte* Klugh, 132 S.C. 199, 128 S.E. 882 (1925). Arguably, by these rulings, the court implicitly overruled *Ex parte* Bond and *Lundy*. Later, the court reversed its reasoning though not its result, by holding that an

redefined "jurisdiction" in *Blandshaw v. State*[42] in which it held that the State lacks jurisdiction to try a defendant until it holds a preliminary hearing.[43] However, the truly important habeas corpus expansion did not evolve from cases in which the court recognized new grounds for defeating the trial court's jurisdiction, but instead developed from cases in which the South Carolina Supreme Court recognized grounds unrelated to jurisdiction as warranting the granting of the writ.

This new category of admissible habeas claims came to include an increasing variety of constitutional rights. Among the newly protected rights were the rights to counsel,[44] to due process,[45] and to equal protection of the laws.[46] However, other complaints of violations of constitutional rights remained unavailable in habeas, including illegal arrest,[47] cruel and unusual punishment,[48] speedy trial,[49] and double jeopardy.[50] Despite these limitations, the court clearly became more inclined to review claims of violations of constitutional rights in habeas proceedings. At the end of the decade, the court implied in *Sullivan v. State*[51] that almost any constitutional claim could be heard in habeas.[52]

Historically, the 1960s were a period of confusion in the South Carolina Supreme Court's habeas jurisprudence. Several cases during this era adhered to the jurisdictional view of habeas.[53] The South Carolina Supreme Court

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excessive sentence does not implicate the jurisdiction of the trial court, but rather is itself a separate ground for habeas relief. *See* Bowers v. State, 241 S.C. 282, 127 S.E.2d 881 (1962).

42. 245 S.C. 385, 140 S.E.2d 784 (1965).

43. *Id.* at 389, 140 S.E.2d at 786; *see also* Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965) (holding that the proper inquiry in habeas when the petitioner alleges an error in the indictment is whether the indictment is so fatally defective as to deprive the court of jurisdiction).

44. State v. Cowart, 251 S.C. 360, 364-67, 162 S.E.2d 535, 536-38 (1968); Pitt v. MacDougall, 245 S.C. 98, 101-06, 138 S.E.2d 840, 841-45 (1964); Grant v. MacDougall, 244 S.C. 387, 389, 137 S.E.2d 270, 271 (1964).

45. Ross v. State, 250 S.C. 442, 445, 158 S.E.2d 647, 648 (1967) (stating that denial of effective assistance of counsel is a due process violation) (citing Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962)).

46. Bostick v. State, 247 S.C. 22, 26, 145 S.E.2d 439, 441 (1965) (finding petitioner's claim that blacks were excluded from the grand and petit juries lacked merit), *rev'd*, 386 U.S. 479 (1967) (per curiam). *But cf.* Lollis v. Manning, 242 S.C. 316, 321, 130 S.E.2d 847, 850 (1963) (holding that a claim in habeas that the Anderson County grand jury was selected in an illegal manner refers only to an "irregularity" and thus is not cognizable in habeas).

47. *See* Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968).

48. *See id.* at 599-600, 164 S.E.2d at 763.

49. Wheeler v. State, 247 S.C. 393, 402-03, 147 S.E.2d 627, 631 (1966).

50. Grant v. MacDougall, 244 S.C. 387, 391-92, 137 S.E.2d 270, 272 (1964).

51. 251 S.C. 53, 159 S.E.2d 918 (1968).

52. *See id.* at 55, 159 S.E.2d at 918-19.

53. *See* Wheeler v. State, 247 S.C. 393, 402-03, 147 S.E.2d 627, 631 (1966); Tyler v. State, 247 S.C. 34, 39-40, 145 S.E.2d 434, 437 (1965).

developed an unusual twist to this approach in *Lollis v. Manning*.[54] In *Lollis* the court first applied the jurisdictional analysis to resolve an alleged irregularity in a grand jury selection process. After finding that the claim did not implicate jurisdiction, the court applied a second test that asked whether the petitioners were either (1) injured by the "irregularity," or (2) objected to the irregularity before the court returned a verdict.[55] Under this test, if the petitioners had objected, the court could have heard the claim on direct appeal.[56] However, the court did not clarify whether the "injury" inquiry empowered the court as an appellate court or as a habeas court.[57]

A few limitations on the substance of the writ survived throughout this period of upheaval. For example, habeas relief remained unavailable to the petitioner who claimed that the evidence was insufficient to support a verdict[58] as well as to the petitioner who claimed actual innocence.[59] On occasion, though, the South Carolina Supreme Court has waived, *ex gratia*, this rule and in habeas proceedings has considered whether the evidence was sufficient to support the verdict.[60] Furthermore, because the writ continued to be regarded as allowing an inquiry into the validity of the defendant's detention, the defendant could not raise claims that did not end or reduce the incarceration period. Thus, the law required a petitioner serving concurrent

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54. 242 S.C. 316, 130 S.E.2d 847 (1963).

55. *Id.* at 321, 130 S.E.2d at 850.

56. *Id.* at 319-21, 130 S.E.2d at 849-50.

57. *See id.* at 321, 130 S.E.2d at 850.

58. Sullivan v. State, 251 S.C. 53, 159 S.E.2d 918 (1968); Wyatt v. State, 243 S.C. 197, 133 S.E.2d 120 (1963), *cert. denied*, 376 U.S. 925 (1964); Medlock v. Spearman, 185 S.C. 296, 194 S.E. 21 (1937).

59. Dickson v. State, 247 S.C. 153, 146 S.E.2d 257 (1966); Hayes v. State, 242 S.C. 328, 130 S.E.2d 906 (1963); *Ex parte* Herrera, 860, S.W.2d 106 (Tex. Crim. App.) (per curiam), *stay denied sub nom.* Herrera v. Collins, 113 S. Ct. 2325 (1993) (mem.).

60. McCrary v. State, 249 S.C. 14, 152 S.E.2d 235, *cert. denied*, 386 U.S. 1013 (1967). Furthermore, procedural aspects of the remedy developed in case law during this period. In many respects, the procedural modifications tracked federal habeas corpus procedure. The basic rule of pleading required the petitioner to make at least a prima facie showing entitling him to relief by stating sufficient facts to allow an intelligent preliminary judgment on the merits. Dickson v. State, 247 S.C. 153, 146 S.E.2d 257 (1966); Wyatt v. State, 243 S.C. 197, 133 S.E.2d 120 (1963), *cert. denied*, 376 U.S. 925 (1964); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965); *cf.* Blackledge v. Allison, 431 U.S. 63, 80 (1977) ("This is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing."). Having done so, petitioner is entitled to a hearing. Johnson v. State, 246 S.C. 483, 144 S.E.2d 285 (1965); Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962). At the hearing, the petitioner has the burden of proving by a preponderance of the evidence that the petition warrants relief. Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); Bailey v. MacDougall, 251 S.C. 290, 162 S.E.2d 177 (1968). On appeal from a decision of the hearing judge, the supreme court is limited to determining whether there is evidence to sustain the findings. Ross v. State, 250 S.C. 442, 158 S.E.2d 647 (1967).

sentences to challenge the validity of both sentences in habeas because the granting of the writ for one sentence alone would not entitle him to release or to a new trial.[61]

C. 1969 to the Present

As noted above, in response to the danger of unredressed constitutional violations, the United States Supreme Court dramatically increased the number of cases in which it granted federal habeas relief to state prisoners asserting federal deprivations of federal constitutional rights.[62] Therefore, to maintain control of the post-conviction process, the states had to expand their remedies to comply with the Court's interpretation of constitutional requirements.[63] This was especially true in light of the Supreme Court's implication in *Young v. Ragen*[64] that the Constitution requires state post-conviction remedies that adequately protect federal rights.[65] In *Case v. Nebraska*[66] the Supreme Court granted certiorari to decide exactly that question,[67] but before the case was heard, the Nebraska legislature passed a post-conviction relief statute that satisfied the Court,[68] and so the Court remanded the case without resolving the question.[69] South Carolina responded to this pressure in 1969 by enacting the Uniform Post-Conviction Procedure Act.[70] The South Carolina Act is virtually identical to the Revised Uniform Post-Conviction Procedure Act promulgated by the National Conference on Commissioners on Uniform State Laws.[71] Unfortunately, there is no legislative history accompanying the General Assembly's passage of the new Act. However, the Uniform Act's history states that it was designed to meet "the minimum standards of justice; and to reduce the use of federal habeas corpus . . . ."[72]

Against this historical backdrop, each of the available remedies is discussed.

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61. McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (1965).

62. *See supra* text accompanying notes 37-39.

63. For a more detailed discussion of this history, see WILKES, *supra* note 32, at 543-45.

64. 337 U.S. 235 (1949).

65. WILKES, *supra* note 32, at 543.

66. 381 U.S. 336 (1965).

67. *Id.* at 337.

68. *Id.*

69. *Id.*

70. Act No. 164, 1969 S.C. Acts 158.

71. UNIF. POST-CONVICTION PROCEDURE ACT, 11 U.L.A. 477 (1974 & Supp. 1993).

72. *Id.* at 481 (Commissioners' Prefatory Note); *see also* Cowden, *supra* note 1, at 422 (comparing the South Carolina Act with the model act).

III. OVERVIEW OF SOUTH CAROLINA POST-CONVICTION PROCEDURE

A. The Purpose of the Post-Conviction Relief Act

The broad purpose of the South Carolina post-conviction process[73] is to provide convicted persons with a comprehensive mechanism to bring to the state court's attention any unresolved and previously not mentioned questions of fact and law relevant to their convictions or sentences.[74] The Act was intended to be exclusive, taking "the place of all other common law, statutory or other remedies heretofore available for challenging the validity of a conviction or sentence."[75] However, it has not quite worked out as intended.

B. Who May Bring an Action and When

The right to apply for post-conviction relief is extended to any person who has been convicted or sentenced for the commission of a crime.[76] Further, a person seeking relief need not be in custody when he brings an action.[77] As long as the applicant alleges that "the results of his prior conviction still persist," even if the sentence has been fully served, the applicant may be entitled to relief.[78]

While there is no statute of limitations, under some circumstances, the state may raise the equitable defense of laches.[79] To do so, however, the state must be able to make some showing of prejudice arising from the late filing.[80] Also, a person cannot maintain an action while "an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected."[81]

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73. The PCR Act and its various requirements are codified at S.C. CODE ANN. § 17-27-10 to -120 (Law. Co-op. 1985), S.C. APP. CT. R. 227, and in S.C. R. CIV. P. 71.1 (formerly Supreme Court Rules 50(1)-(8)).

74. S.C. CODE ANN. § 17-27-20(a) (Law. Co-op. 1985); *see also* YACKLE, *supra* note 11, at 3 (discussing the functions served by state habeas remedies).

75. S.C. CODE ANN. § 17-27-20(b) (Law. Co-op. 1985).

76. *Id.* § 17-27-20(a).

77. McDuffie v. State, 276 S.C. 229, 277 S.E.2d 595 (1981).

78. *Id.* at 231, 277 S.E.2d at 596. For example, McDuffie alleged that his South Carolina conviction was used to enhance the punishment for a subsequent North Carolina charge. *Id.* at 230, 277 S.E.2d at 595.

79. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981).

80. Brazell v. State, 278 S.C. 253, 294 S.E.2d 343 (1982) (per curiam). For example, the state must be able to demonstrate the unavailability of material witnesses or that other critical evidence has been lost or destroyed as a result of the delay. *See id.* at 254, 294 S.E.2d at 343.

81. S.C. R. CIV. P. 71.1(b).

C. *The Relationship Between PCR and Direct Appeal*

The language of the statute specifically states that post-conviction relief is "not a substitute for . . . direct review of the sentence or conviction."[82] This clause has several important implications. First, it prevents an applicant from filing for post-conviction relief while a direct appeal is pending, or prior to the expiration of time for the filing of a direct appeal.[83] Second, in some cases, the clause will prevent the applicant from raising in the post-conviction proceeding any claim of trial error that could have been raised on direct appeal.[84] Additionally, an applicant may not reassert in a post-conviction proceeding any issues that were raised previously on direct appeal.[85] The doctrine that "[e]rrors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"[86]—sometimes referred to as the *Simmons* rule[87]—has been reaffirmed in a host of noncapital cases.[88] Until recently, however, the South Carolina courts had never applied the rule in a capital case, because of the doctrine of *in favorem vitae*.[89] Thus, in several decisions the supreme court addressed legal issues in post-conviction raised for

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82. S.C. CODE ANN. § 17-27-20(b) (Law. Co-op. 1985).

83. *See* S.C. R. CIV. P. 71.1(b).

84. *See* Griffin v. Warden, 277 S.C. 288, 286 S.E.2d 145, *cert. denied*, 459 U.S. 942 (1982); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975); Johnson v. State, 261 S.C. 350, 200 S.E.2d 81 (1973) (per curiam).

85. *Simmons*, 264 S.C. at 423, 215 S.E.2d at 885.

86. *Id.* (quoting State v. White, 162 S.E.2d 473, 480 (N.C. 1968)).

87. *See* Drayton v. Evatt, ___ S.C. ___, ___, 430 S.E.2d 517, 520, *cert. denied,* 114 S. Ct. 607 (1993).

88. *See, e.g.*, Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). However, jurisdictional defects in the proceedings may be raised at any time. *See* Williams v. State, 306 S.C. 89, 410 S.E.2d 563 (1991).

89. Pursuant to *in favorem vitae*, the South Carolina Supreme Court was obligated "to review the entire record for legal error, and assume error when unobjected-to but technically improper arguments, evidence, jury charges, *etc.* are asserted by the defendant on appeal in a demand for reversal or a new trial." State v. Torrence, 305 S.C. 45, 60-61, 406 S.E.2d 315, 324 (1991) (Toal, J., concurring); *see also Drayton*, 430 S.E.2d at 519 (discussing *in favorem vitae* review). It meant that issues could be raised on direct appeal in a capital case regardless of whether there had been a proper objection at trial, or some other procedural obstacle to merit review of the claims. *See, e.g.*, State v. Butler, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982), *overruled by Torrence*. Furthermore, on several occasions, the South Carolina Supreme Court reversed capital cases on the basis of issues not raised by the parties. *See, e.g.*, State v. Gilbert, 273 S.C. 690, 695 258 S.E.2d 890, 893 (1979), *cert. denied*, 456 U.S. 984 (1982), *overruled by Torrence*. The *in favorem vitae* doctrine, which had been firmly entrenched in capital punishment jurisprudence of the South Carolina Supreme Court for almost two hundred years, was abolished in *Torrence*. *See* State v. Briggs, 3 S.C.L. (1 Brev.) 7 (1794). Thus, capital cases that proceeded to trial after *Torrence* are governed by essentially the same procedural rules that are applicable to noncapital cases.

the first time in state collateral proceedings.[90] However, in *Drayton v. Evatt*[91] the court held that in capital cases reviewed pursuant to *in favorem vitae*, legal claims apparent from the face of the record are barred from collateral review.[92] The second aspect of *Simmons* bars such issues in that they cannot be reasserted in post-conviction proceedings.[93] The court reasoned that "[u]nder *in favorem vitae* review, all direct appeal errors are assumed to have been reviewed by this Court, and thus are barred from collateral attack."[94]

The main consequence of the *Simmons* rule is that issues that could have been raised on direct appeal, but were not, also require a claim of ineffective assistance of appellate counsel.[95] Furthermore, an issue which was not raised on direct appeal because it had not been properly preserved at trial (trial counsel did not lodge a contemporaneous or adequate objection), or an issue which was raised on direct appeal but not considered by the appellate court for the same reason (inadequate preservation of the record at trial), must be accompanied by an allegation of ineffective assistance of trial counsel.[96] Both the substantive claim and the ineffective assistance of counsel claims should be included in the application for post-conviction relief.[97]

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90. *See, e.g.*, Yates v. Aiken, 290 S.C. 231, 234, 349 S.E.2d 84, 86 (1986), *rev'd*, 484 U.S. 211 (1988); Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984).

91. ___ S.C. ___, 430 S.E.2d 517 (1993).

92. *Id.* at ___, 430 S.E.2d at 520 (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)).

93. *Drayton*, ___ S.C. at ___, 430 S.E.2d at 520.

94. *Id.* at ___, 430 S.E.2d at 519. However, the court left open the possibility that, in some circumstances, a death sentenced inmate may raise record-based issues in a petition for writ of habeas corpus. *Id.* at ___, 430 S.E.2d at 520 n.2 (citing Butler v. State, 302 S.C. 466, 397 S.E.2d 87, *cert. denied*, 498 U.S. 972 (1990)). Furthermore, this rule only applies if the court reviewed the case on direct appeal *in favorem vitae*. If a trial commenced after the South Carolina Supreme Court's decision in *Torrence*, then counsel cannot assume that the Supreme Court reviewed all record-based issues. State v. Rocheville, ___ S.C. ___, 425 S.E.2d 32, 34-35, *cert. denied*, 113 S. Ct. 2978 (1993). Issues not raised in these cases should be included in the application for post-conviction relief accompanied by an allegation of ineffective assistance of appellate counsel. *Drayton*, ___ S.C. at ___, 430 S.E.2d at 520 (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)).

95. *Drayton*, ___ S.C. at ___, 430 S.E.2d at 520 (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)); *see also* Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992) (hearing direct appeal issue because of trial counsel's ineffectiveness); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (per curiam) (affirming the denial of relief when the post-conviction relief judge held that counsel was not ineffective).

96. *See, e.g.*, Simmons v. State, ___ S.C. ___, 419 S.E.2d 225 (1992) (finding ineffective assistance of counsel and granting post-connection relief); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); (granting post-conviction relief because of trial error which court did not review on direct appeal due to a lack of contemporaneous objection).

97. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986). Another consequence of the Court's view that the class of claims able to be raised on appeal and the class of claims able to be raised

D. Cognizable Claims

Under the South Carolina Post-Conviction Procedure Act, almost any alleged denial of a federal constitutional rights is cognizable in a post-conviction proceeding.[98] The only federal claim not available is sufficiency of the evidence.[99] Furthermore, the Act recognizes almost any abridgment of a state created right.[100] Specifically, the statute renders the following categories of claims cognizable: (1) the conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;[101] (2) the court was without jurisdiction to impose sentence;[102] (3) the sentence exceeds the maximum authorized by law;[103] (4) there exists evidence of material facts not previously presented and heard thereby requiring vacation of the conviction or sentence in the interest of justice;[104] (5) his

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in post-conviction proceedings are mutually exclusive is that one may not raise on direct appeal any claim that can be raised only in post-conviction proceedings. *See, e.g.*, State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) (holding a claim of ineffective assistance of counsel can only be raised in post-conviction proceedings), *cert. denied*, 480 U.S. 940 (1987); State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982) (finding involuntariness of a guilty plea can only be attacked in post-conviction proceedings).

98. Finklea v. State, 273 S.C. 157, 158, 255 S.E.2d 447, 447-48 (1979) ("Our Post-Conviction Procedure Act is designed to incorporate all rights available under federal habeas corpus." (citing Harvey v. South Carolina, 310 F. Supp. 83 (D.S.C. 1970))).

99. S.C. CODE ANN. § 17-27-20(a)(6) (Law. Co-op. 1985) ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). *But cf.* Jackson v. Virginia, 443 U.S. 307, 313-16 (1979) (holding that insufficiency of evidence is a federal constitutional claim).

100. S.C. CODE ANN. § 17-27-20(a)(1) (Law. Co-op. 1985).

101. *Id.*; *see also* Singleton v. State, ___ S.C. ___, 437 S.E.2d 53, 58, 61 (1993) (holding that petitioner was not presently competent and thus his execution would violate the Eighth Amendment to the United States Constitution and further that Article I, Section 10 of the South Carolina Constitution prevents the state from forcibly medicating applicant with psychotropic drugs in an effort to restore his competency); Murdock v. State, ___ S.C. ___, ___, 426 S.E.2d 740, 741-42 (1992) (finding that petitioner was denied her right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution).

102. S.C. CODE ANN. § 17-27-20(a)(2) (Law. Co-op. 1985); *see also* Slack v. State, ___ S.C. ___, ___, 429 S.E.2d 801, 802 (1993) (finding the trial court lacked jurisdiction to accept petitioner's plea to grand larceny because he had neither been indicted for that offense nor waived presentment of the charge).

103. S.C. CODE ANN. § 17-27-20(a)(3) (Law. Co-op. 1985); *see also* Fewell v. State, 267 S.C. 17, 20-22, 225 S.E.2d 853, 854-55 (1976) (finding that a ten year sentence for a first offense of possession of LSD with intent to distribute was excessive when the petitioner was charged only with simple possession of LSD, which is limited by statute to two years for the first offense); Clark v. State, 259 S.C. 378, 382-83, 192 S.E.2d 209, 210 (1972) (per curiam) (holding that an inmate can not seek a "time cut" in a sentence if the sentence was within the statutorily defined limits). The lack of jurisdiction to reduce otherwise proper sentences seems not to be widely recognized by many inmates who file *pro se* applications seeking a reduction in their sentences.

104. S.C. CODE ANN. § 17-27-20(a)(4) (Law. Co-op. 1985). This is similar to the relevant

sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody . . . ;[105] and (6) the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error [previously] available under any common law, statutory or other motion, writ, petition, proceeding or remedy . . . .[106]

In sum, an application for post-conviction relief may include virtually any allegation relevant to any phase of the previous court proceedings.[107]

E. Various Pleading and Procedural Issues

1. Post-Conviction is a Civil Proceeding

It is important to note that post-conviction relief is a civil proceeding. An

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standard the court uses in evaluating motions for new trial based on after-discovered evidence. *See infra* notes 205-15 and accompanying text. The supreme court has not explored the relationship between this particular aspect of post-conviction relief and a motion for new trial, but it appears that both remain viable means of bringing new evidence before the state courts. *Compare* State v. South, ___ S.C. ___, ___, 427 S.E.2d 666, 668-69 (1993) (considering after-discovered evidence as part of a motion for new trial) *with* Clark v. State, ___ S.C. ___, ___, 434 S.E.2d 266, 267-68 (1993) (considering after-discovered evidence as part of an application for post-conviction relief).

105. S.C. CODE ANN. § 17-27-20(a)(5) (Law. Co-op. 1985); *see also* Griffin v. State, ___ S.C. ___, ___, 433 S.E.2d 862, 863-64 (1993) (finding that applicant's decision to plead guilty to voluntary manslaughter was based on his ability to petition for parole annually, therefore, a law changing the standard to biannual parole review violated the Ex Post Facto Clause of the U.S. Constitution), *cert. denied,* No. 93-858, 1993 WL 501895 (Jan. 24, 1994).

106. S.C. CODE ANN. § 17-27-20(a)(6) (Law. Co-op. 1985). However, conditions of confinement are not cognizable in post-conviction. *See* Tutt v. State, 277 S.C. 525, 526, 290 S.E.2d 414, 415 (1982) (per curiam). *But see* Crowe v. Leeke, 273 S.C. 763, 763-64, 259 S.E.2d 614, 615 (1979) (holding that conditions of confinement are properly raised as part of a state habeas corpus claim).

107. Most modern post-conviction cases focus on general or particular allegations of ineffective assistance of counsel. *See, e.g.*, Chalk v. State, ___ S.C. ___, 437 S.E.2d 19 (1993) (per curiam); Murdock v. State, ___ S.C. ___, 426 S.E.2d 740 (1992); Simmons v. State, ___S.C.___, 419 S.E.2d 225 (1992); Riddle v. State, ___ S.C. ___, 418 S.E.2d 308 (1992); Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992).

In my opinion, however, counsel usually gives inadequate attention to other available constitutional claims. *E.g.*, Giglio v. United States, 405 U.S. 150 (1972) (holding prosecution may not solicit false or perjured testimony or allow it to go uncorrected); Massiah v. United States, 377 U.S. 201 (1964) (holding state can not elicit statement from jailed defendant through surreptitious use of another inmate after the defendant's right to counsel has attached); Brady v. Maryland, 373 U.S. 83 (1963) (finding due process requires state to disclose to defendant exculpatory material); Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (holding conviction violates due process if defendant was not competent to stand trial); Remmer v. United States, 347 U.S. 227 (1954) (holding juror's communications with third party rendered defendant entitled to a hearing to determine effect of communications on juror), *reh'g granted*, 348 U.S. 904 (1955).

application for post-conviction relief constitutes an independent civil action,[108] and, therefore, the South Carolina Rules of Civil Procedure apply to the extent that they are not inconsistent with the UPCA.[109] The statute specifically incorporates the applicable civil practice rules into post-conviction practice.[110]

Thus, the petitioner commences the process by filing a complaint or more specifically, an application for post-conviction relief in the circuit in which the defendant was convicted.[111] The UPCA and the Rules of Civil Procedure set out specific requirements for information that must be included in the application.[112] If the applicant is unable to pay for court costs and representation fees, the applicant may file and proceed *in forma pauperis*.[113]

2. *Pleading Grounds for Relief*

The UPCA requires that the application allege particular grounds for relief—the specific defects in the trial or criminal proceeding that warrant a reversal or recision—including the legal basis for the claims and supporting facts. The application must also clearly state the relief desired.[114] The petitioner may include affidavits, court records, or other material relevant as evidence with the application.[115]

In raising issues in state post-conviction, counsel should keep the federal habeas corpus exhaustion doctrine in mind. Before a claim may be presented in federal court, it must have first been presented to the state court; therefore, available state remedies must be exhausted. The purpose of the exhaustion requirement is "to protect the state courts' role in the enforcement of federal

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108. S.C. R. CIV. P. 71.1(c).

109. S.C. R. CIV. P. 1, 71.1(a); Arnold v. State, ___ S.C. ___, ___, 420 S.E.2d 834, 842 (1992), *cert. denied*, 113 S. Ct. 1302 (1993).

110. S.C. CODE ANN. § 17-27-80 (Law. Co-op. 1985); *see* Gamble v. State, 298 S.C. 176, 379 S.E.2d 119 (1989).

111. S.C. CODE ANN. § 17-27-40 (Law. Co-op. 1985). If the conviction is an adult offense, the application is filed in the Court of Common Pleas. *See* S.C. CODE ANN. § 17-27-30 (Law. Co-op. 1985). If the offense is juvenile in nature, it is filed in the Family Court. S.C. CODE ANN. § 20-7-450 (Law. Co-op. 1985). Furthermore, if the court granted a change of venue, the petitioner should file the application in the county to which the venue was changed, not the county in which the offense allegedly took place and the defendant originally was charged.

112. S.C. CODE ANN. §§ 17-27-40 to -50 (Law. Co-op. 1985). A copy of the application is included as Form 5 of the Appendix of Forms created pursuant to S.C. R. CIV. P. 84.

113. *See* S.C. CODE ANN. § 17-27-60 (Law. Co-op. 1985).

114. *Id.* § 17-27-50.

115. *Id.* Additionally, the application must include a verification signed by the applicant which affirms that the facts alleged in the application are within the personal knowledge of the applicant and affirms the authenticity of all documents and exhibits contained in the application. *Id.* § 17-27-40.

law and prevent disruption of state judicial proceedings."[116] A claim is generally considered exhausted when the claim has been "fairly presented" one time to the highest state court.[117] For example, if the defendant raises the claim on direct appeal, it does not have to be raised again in the state post-conviction proceedings.[118] Furthermore, the United States Supreme Court has held that the exhaustion requirement is satisfied even if the state tribunal does not fully consider the claim, as long as it had a fair opportunity to do so, and as such, the state courts were reasonably informed of the nature of the claim; generally, this means that state courts must be given the relevant facts and law and must be apprised that the claim rests, in whole or in part, on the federal constitution.[119] Therefore, for pleading purposes, counsel should insure that all grounds for post-conviction relief fairly inform the court of these relevant facts and the claim's federal constitutional basis.[120]

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116. Rose v. Lundy, 455 U.S. 509, 518 (1982) (citing Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490-91 (1973)).

117. *Id.* at 523 (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)).

118. Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam).

119. *See* Anderson v. Harless, 459 U.S. 4 (1982) (per curiam); *see also* Picard v. Connor, 404 U.S. 270, 275-76 (1971) (discussing the requirements of the exhaustion doctrine); Wise v. Warden, 839 F.2d 1030, 1033 (4th Cir. 1988) (applying the exhaustion doctrine).

120. For example, suppose counsel's investigation revealed that a "jailhouse snitch," who testified against the applicant at trial, was encouraged by law enforcement to elicit information from the applicant. The ground for relief set forth below would satisfy the exhaustion requirement (Numbers refer to items 9 and 10 found in Form 5 of the Appendix of Forms promulgated pursuant to S.C. R. Civ. P. 84).

> 9(x) *The State violated applicant's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and by South Carolina law when it failed to reveal that one of its witnesses was acting as a state agent when he allegedly obtained incriminating information from applicant.*
>
> 10(x) John Doe testified for the State at applicant's trial, maintaining that applicant, while both men were incarcerated, provided him with certain information regarding the crime. Not only was John Doe's testimony false, but also the State failed to reveal that Doe was acting as a state agent at the time he allegedly discussed the case with applicant. Furthermore, the incriminating statements were obtained after applicant's right to counsel had attached. *See* United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).

Similarly, the following claim would exhaust an allegation of ineffective assistance of counsel:

> 9(y) *Applicant was denied the effective assistance of counsel, in violation of South Carolina law, and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of trial counsel's failure to request an instruction that any doubt as to whether applicant was guilty of murder or manslaughter must be resolved in applicant's favor.*
>
> 10(y) Applicant was convicted of murder. The jury was also instructed regarding

3. The State's Response

After the petitioner files the application, the code requires the clerk of court to forward a copy to the solicitor's office and the attorney general's office.[121] The State—as respondent—is required to answer the allegations within thirty (30) days, or within such further time as the court may allow.[122] However, if the respondent fails to file an answer in the specified period, the applicant must conclusively show that he has been prejudiced by the respondent's delay in order to receive the relief requested in the application.[123]

4. Prehearing Procedure

a. Appointment of Counsel

If the application contains issues that will necessitate a hearing to resolve, and the applicant is indigent, the court is obligated to promptly appoint counsel. The rules specifically mandate that counsel must be permitted a reasonable time to confer with the applicant, to evaluate the application, and to insure that all available grounds for relief are included in the application.[124]

b. Amending the Application

Counsel may—and should—amend the application to include additional grounds for relief.[125] In practice, the rules allow amendments until the time the court conducts the evidentiary hearing. Furthermore, pursuant to S.C. R.

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the lesser included offense of manslaughter. However, the trial judge failed to instruct the jury that any doubt as to whether applicant was guilty of the greater or lesser offense must be resolved in his favor. Despite the fact that this instruction was clearly warranted and required by South Carolina law, counsel neither requested the instruction nor objected to the trial judge's failure to properly charge the jury. *See* State v. Davis, ___ S.C. ___, 422 S.E.2d 133, 145 (1992) (citing State v. King, 158 S.C. 251, 155 S.E. 409 (1930)), *cert. denied*, 113 S. Ct. 2355 (1993). Counsel's omission was both unreasonable and prejudicial. *See* Strickland v. Washington, 466 U.S. 668 (1984); Chalk v. State, ___ S.C. ___, 437 S.E.2d 19 (1993) (per curiam).

121. S.C. CODE ANN. § 17-27-40 (Law Co-op. 1985).

122. *Id.* § 17-27-70(a); *see also* Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (discussing the discretionary nature of the thirty day limit).

123. Kneece v. State, 269 S.C. 177, 236 S.E.2d 746 (1977) (per curiam) (citing Herring v. State, 262 S.C. 597, 206 S.E.2d 885 (1974)).

124. *See* S.C. R. CIV. P. 71.1(d). For a discussion of the various problems associated with the appointment of counsel in post-conviction proceedings see Cowden, *supra* note 1, at 428-34.

125. S.C. R. CIV. P. 71.1(d).

Civ. P. 15(b), the petitioner may amend the application during or after the hearing to conform the pleadings to the evidence presented.[126]

c. *Discovery*

The rules of discovery applicable in other civil cases also apply in post-conviction proceedings.[127] The rules allow use of interrogatories, requests to produce documents, depositions, requests for admission, and other discovery mechanisms.[128]

d. *Funds for Investigative and Expert Services*

Limited funds are available for investigative and expert services. Pursuant to the 1994 Appropriations Act,[129] counsel in post-conviction proceedings are allotted five hundred dollars for investigative and expert services.[130] However, the statute clearly contemplates that the court may award additional funds upon a showing of reasonable necessity.[131]

e. *Determining Whether a Hearing is Required*

The UPCA requires the court to evaluate the application and the return before it can make any ultimate dispensation of the proceedings. Once it has had the opportunity to fully review the pleadings, the court may indicate its intent to dismiss the application.[132] However, if the application sets forth grounds for relief that present issues of fact that are not conclusively refuted by the record, a hearing must be held.[133] If the court decides there is absolutely no basis for the relief sought, it will notify the parties of the reasons

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126. *See* Arnold v. State, 420 S.E.2d 834, 842 (citing Baxley v. Rosenblum, 303 S.C. 340, 400 S.E.2d 502 (Ct. App 1991)). However, the court also held in *Arnold* that completely new issues could not be added to the application pursuant to S.C. R. CIV. P 59(e) after a final order was entered denying post-conviction relief. *Id.*

127. *See* Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989).

128. *See* S.C. CODE ANN. § 17-27-80 (Law. Co-op. 1985); S.C. R. CIV. P. 71.1(a).

129. Act. No. 164, 1993 S.C. Acts 531.

130. *Id.* at 1221 (codified at S.C. Code Ann. § 17-3-50(B) (Law. Co-op. Supp. 1993)).

131. *Id.* (codified at S.C. Code Ann. § 17-3-50(C) (Law. Co-op. Supp. 1993).

132. S.C. CODE ANN. § 17-27-70(b) (Law. Co-op. 1985).

133. Chambers v. State, 262 S.C. 202, 206, 203 S.E.2d 426, 428 (1974). As a general rule, a sufficiently pleaded allegation of ineffective assistance of counsel will insure that a hearing is conducted. *See* Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973) (holding that a claim of ineffective assistance of counsel presents a *prima facie* violation of constitutional rights thereby requiring an evidentiary hearing to resolve a question of fact). Conversely, a hearing is not required if the application only raises questions of law. Ballew v. State, 262 S.C. 393, 396, 204 S.E.2d 736, 737 (1974).

supporting its decision and dismiss the case in a conditional order of dismissal.[134] The Act provides the applicant the opportunity to submit a response to any such order.[135] In practice, evidentiary hearings are generally held in cases involving an inmate's first application for post-conviction relief.

5. *Evidentiary Hearings*

Evidentiary hearings are generally held during post-conviction terms of court scheduled by the Office of Court Administration. Most judicial circuits have two or more post-conviction terms a year.[136] However, it is not uncommon for post-conviction hearings in capital cases to be heard at special terms of court requested by the Attorney General or scheduled with the consent of both parties.[137]

At the hearing, the applicant, as the moving party, presents his evidence first and has the burden to prove, by a preponderance of the evidence, that he is entitled to the relief sought in the application.[138] Evidence and testimony may be presented through affidavits,[139] depositions, and oral testimony.[140] As a strategic matter, counsel must remember that the judge presiding over the evidentiary hearing knows little or nothing about the case in most circumstances. Thus, for example, a trial brief summarizing the evidence presented at the applicant's trial and introducing the court to the issues presented in the application for post-conviction relief may prove invaluable to the court's understanding of the relevant facts and law. Similarly, if evidentiary issues will likely arise at the hearing, counsel should prepare a memorandum for the court addressing those issues. In sum, the hearing should be viewed in the same manner as counsel would view any civil non-jury trial.

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134. S.C. CODE ANN. § 17-27-70(b) (Law. Co-op. 1985).

135. *Id.*

136. Court Administration issues a list of the terms of court approximately once every six months.

137. In South Carolina, the judge who presided over the applicant's guilty plea, trial, or probation revocation proceeding may not preside at the post-conviction relief hearing. Floyd v. State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) (per curiam).

138. S.C. R. CIV. P. 71.1(e); *see* Cobbs v. State, 305 S.C. 299, 301, 408 S.E.2d 223, 225 (1991) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)), *cert. denied*, 474 U.S. 1094 (1986).

139. *See* Beckett v. State, 278 S.C. 223, 294 S.E.2d 46 (1982) (per curiam); S.C. CODE ANN. § 17-27-80 (Law. Co-op. 1985).

140. S.C. CODE ANN. § 17-27-80 (Law. Co-op. 1985).

6. *Posthearing Procedure*

a. Posthearing Briefs

In complicated fact-intensive cases involving the testimony of several witnesses, those containing a number of issues, or other appropriate cases, counsel should seek leave to file a post-hearing brief. In many instances, counsel may want to review the transcript of the evidentiary hearing before preparing the brief. In capital post-conviction cases, for example, counsel for both applicant and the respondent file post-hearing briefs due to the inevitably complex nature of the relief grounds. In general, the courts will allow counsel for the applicant to file a brief thirty to forty-five days after the court has provided the evidentiary hearing transcript to counsel.[141] The Attorney General is given a similar amount of time to file it's post-hearing brief.[142]

b. Orders

The UPCA states that the "court shall make specific findings of fact, and state expressly its conclusions of law" in reaching its decision on the application.[143] The post-conviction relief judge is permitted to issue any orders necessary with respect to the applicant's conviction or sentence. If the court finds in favor of the applicant, it has the power to enter an "appropriate order,"[144] which has been interpreted by the South Carolina Supreme Court as granting the lower court the authority to "fashion an appropriate remedy."[145] The appropriate order is a final judgement.[146]

In most cases, the court will ask the prevailing party to prepare an order. However, counsel should be aware that the court is not supposed to contact counsel *ex parte*, and the losing party must be given an adequate opportunity to respond to any proposed order submitted by opposing counsel.[147] Furthermore, the order should adequately address the merits of every issue in

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141. This rule is based solely on the practice as it has evolved. [AUTHOR].

142. *Id.*

143. S.C. CODE ANN. § 17-27-80 (Law. Co-op. 1985).

144. *Id.*

145. Singleton v. State, ___ S.C. ___, 437 S.E.2d 53 (1993). For example, the court stated that under some circumstances, the post-conviction judge could vacate the applicant's conviction and sentence. In the court's view, this would be a "clear cut remedy" if the post-conviction court determined, based on evidence presented at the evidentiary hearing, that the applicant had been wrongfully convicted. *Id.* at ___, 437 S.E.2d at 59.

146. S.C. CODE ANN. § 17-27-80 (Law. Co-op. 1985).

147. S.C. APP. CT. R. 501, CANON 3(A)(4); *see* Stukes v. Hawkins, 288 S.C. 485, 343 S.E.2d 623 (S.C. 1986); Herring v. Retail Credit Co., 266 S.C. 455, 461, 224 S.E.2d 663, 666 (1976).

the application. In *Pruitt v. State*,[148] the South Carolina Supreme Court expressed "concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant."[149] The court noted that not only did this deprive the parties of a ruling on the issues raised, but it also made appellate review more laborious.[150] In fact, in *Pruitt*, the court determined that the failure to address the issues in the order required that a new hearing be conducted.[151] The court stated:

> Counsel preparing orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order before signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP.[152]

c. Motions to Alter or Amend the Judgement

A motion to alter or amend the judgment, brought pursuant to South Carolina Rule of Civil Procedure 59(e), may be appropriate in some cases. The primary purpose of a rule 59(e) motion is to permit the trial judge to "reconsider matters properly encompassed in a decision on the merits."[153] Thus, the motion may be utilized when the order contains erroneous findings of fact or a clear misapplication of established legal principles. A Rule 59(e) motion would also seem to be appropriate if there has been intervening authority relevant to an issue in the case. Furthermore, as noted above, the South Carolina Supreme Court recently held that counsel must file a rule 59(e) motion if the order does not set forth the findings and the reason for the findings relevant to each and every ground for relief contained in the application.[154]

A Rule 59(e) motion must be served within ten days of receiving written notice of the entry of the order denying post-conviction relief.[155] Furthermore, it tolls the time for filing a notice of intent to appeal.[156]

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148. ___ S.C. ___, 423 S.E.2d 127 (1992) (per curiam).

149. *Id.* at ___, 423 S.E.2d at 128.

150. *Id.* at ___, 423 S.E.2d at 128.

151. *Id.* at ___, 423 S.E.2d at 128.

152. *Id.* at ___, 423 S.E.2d at 128.

153. *See* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988) (quoting White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451 (1982)).

154. *Pruitt*, ___ S.C. at ___, 423 S.E.2d at 128.

155. S.C. R. Civ. P. 59(b).

156. S.C. R. Civ. P. 59(f).

F. Appeals

1. Perfecting the Appeal

The UPCA and South Carolina Appellate Court Rule 227 provide for an appeal by either the applicant or the state.[157] In some cases, cross-appeals are filed, for example, if the judge grants post-conviction relief in regard to a death sentenced inmate's sentence, but concludes that the inmate is not entitled to a new guilt-or-innocence trial. Thus, to effectuate an appeal from the denial of post-conviction relief, counsel must serve a notice of appeal on the respondent within thirty (30) days after receipt of written notice of entry of the order denying relief.[158] If a timely motion to alter or amend the judgment was filed, then the notice of appeal must be filed thirty days after written notice of entry of the order denying the motion.[159] Furthermore, if a cross-appeal is planned, respondent must serve "a notice of appeal on all adverse parties within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires."[160] The notice of appeal must be filed with the Clerk of the Supreme Court and the clerk of the lower court—the county in which the application was filed—within ten days after it is served on opposing counsel.[161]

The transcript of the hearing must be ordered within ten days of service of the notice of appeal.[162] Then, thirty days after receipt of the transcript, the petitioner—the appellant—must serve and file the appendix and petition for writ of certiorari.[163] The respondent is given thirty (30) days to file and

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157. S.C. CODE ANN. § 17-27-100 (Law. Co-op. 1985). ("[A] final judgment entered under this chapter may be reviewed by the Supreme Court of this State on appeal brought either by the applicant or the State in accordance with laws governing appeals from the circuit court in civil cases.").

158. S.C. APP. CT. R. 227(b); *see* S.C. APP. CT. R. 203(b)(1). The contents of the notice of appeal are set forth in S.C. APP. CT. R. 203(e).

159. S.C. APP. CT. R. 203(b)(1).

160. S.C. APP. CT. R. 203(c).

161. S.C. APP. CT. R. 203(d).

162. S.C. APP. CT. R. 206(a); *see* S.C. APP. CT. R. & 227(b).

163. The rules require the petitioner to serve a petition for writ of certiorari and the appendix on opposing counsel and file six copies of the petition and two copies of the appendix with the Clerk of the Supreme Court. S.C. APP. CT. R. 227(c). Rule 227(d) adds the following requirements:

> The petition for writ of certiorari shall contain the following:
> (1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. (2) A concise statement of the case, containing the facts material to the consideration of the questions presented. (3) A direct and concise argument in support of the petition. The argument relevant to each question shall not exceed four (4) pages and shall include citation of authority and

serve a return.[164] Petitioner may file a reply to the return if such a pleading is necessary.

Aside from these technical requirements, counsel should understand several aspects of the post-conviction appeals process. First, it is a certiorari procedure, and, therefore, the South Carolina Supreme Court has discretionary review.[165] Full briefing and plenary consideration are not given unless the court grants certiorari.[166] Furthermore, the court can—and frequently does—grant certiorari to consider some, but not all, of the issues the petitioner raises. Nevertheless, it is critical that counsel raise every issue in the petition for writ of certiorari. The failure to raise an issue may subsequently deprive the applicant of federal review of the issue. In *Whitley v. Bair*[167] the Fourth Circuit found that petitioner's failure to appeal certain issues to the Virginia Supreme Court following the denial of state habeas corpus was a procedural default barring federal habeas corpus relief.[168] While it is not clear if the *Whitley* rule applies to South Carolina cases, the safest course is to include all issues in the petition.[169] Finally, it is important that counsel realize that the South Carolina Supreme Court utilizes a stringent standard of review in post-conviction appeals. The court will affirm the lower court's decision if there is any evidence of probative value supporting its decision.[170]

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specific reference to pertinent portions of the lower court record.

S.C. APP. CT. R. 227(d). The appendix, filed along with the writ of certiorari, contains: "(1) The entire lower court record [and] (2) A copy of the final order entered after the post-conviction proceeding. S.C. APP. CT. R. 227(e).

164. The original petition plus six copies of the return, with proof of service, must be filed with the Clerk of the Supreme Court. S.C. APP. CT. R. 227(f). The contents of the return are set forth in the same rule.

165. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (per curiam); Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985) (per curiam); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); *see* S.C. APP. CT. R. 227(a).

166. Certiorari will be granted "[u]pon the concurrence of any two justices . . . ." S.C. APP. CT. R. 227 (h). Further, the procedure to be followed once certiorari is granted is set forth in Rule 227(h). One important difference between cases in which the court grants certiorari and many other appeals is that oral argument is not permitted unless ordered by the supreme court. *Id.*

167. 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

168. *Id.* at 1499-1501.

169. In this regard, the South Carolina Supreme Court determined that the procedure set forth in Anders v. California, 386 U.S. 738, 744 (1967) (requiring appellate counsel to brief arguable issues, despite counsel's belief that the issues is frivolous), applies in the context of post-conviction appeals. *See* Johnson v. State, 294 S.C. 310, 310, 364 S.E.2d 201, 202 (1988) (per curiam). The court reasoned that even though there may not be a constitutional right to appellate counsel in post-conviction proceedings, S.C. APP. CT. R. 227 "provides for the appointment of counsel to seek appellate review on PCR." Austin v. State, 305 S.C. 453, 455, 409 S.E.2d 395, 396 (1991) (per curiam).

170. *See, e.g.*, Jeter v. State, ___ S.C. ___, ___, 417 S.E.2d 594, 596 (1992); Cobbs v. State, 305 S.C. 299, 301, 408 S.E.2d 223, 225 (1991); Grier v. State, 299 S.C. 321, 323, 384 S.E.2d

2. *White v. State Appeals*

Somewhat different rules apply if the applicant maintains that he was previously denied the right to a direct appeal of his conviction. In *White v. State*[171] the supreme court held that trial counsel is obligated to make certain that a defendant is aware of his right to appeal his conviction, and that in the absence of an "intelligent waiver" by the client, counsel is obligated to perfect an appeal.[172] Thus, if the applicant in the post-conviction proceeding asserts that he did not fully, voluntarily, and intelligently waive his right to direct appeal, the following procedure applies:

> (1) When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-conviction relief issues petitioner seeks to have reviewed. At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues. This brief shall, to the extent possible, comply with the requirements of Rule 207(b). Respondent's return to the petition shall address the post-conviction issues, including whether the direct appeal was knowingly and intelligently waived. At the same time the return is due, respondent shall also serve and file a brief addressing the direct appeal issues. Within ten (10) days after service of respondent's brief, petitioner may file a reply brief on the direct appeal issues.
>
> (2) When the post-conviction relief judge has found that the applicant is *not* entitled to a *White v. State* review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a *White v. State* review is granted; this statement of issues shall comply with the requirements of Rule 207(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.[173]

722, 724 (1989) (per curiam); Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (per curiam).

171. 263 S.C. 110, 208 S.E.2d 35 (1974).

172. *Id.* at 118, 208 S.E.2d at 39.

173. S.C. APP. CT. R. 227(g). The procedure contained in rule 227(g) was initially set forth in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). *See also* King v. State, ___ S.C. ___, 417 S.E.2d 868 (1992) (discussing the PCR procedure); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (reviewing the *Davis* requirements); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992) (applying *Davis* review); Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) (applying *Davis* review).

G. *Successive Applications*

The South Carolina Supreme Court has consistently disfavored inmates who bring more than one post-conviction challenge. In the court's view, the UPCA, relevant rules, and the court's decisions are intended to provide an inmate "one bite at the apple."[174] The court has stated that this limitation on an inmate's ability to challenge his conviction (or sentence) is necessary because

> [f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment would amount to a gross miscarriage of justice.[175]

Thus, as a general rule, a second, or successive, application may not contain issues (1) that were presented in the original application, (2) that were fully adjudicated in the first appeal or were knowingly and voluntarily waived, or (3) that were not raised at all, unless the applicant can provide a "sufficient reason" why the issue(s) was not previously raised.[176] The court also recently stated that it interprets "sufficient reason" very narrowly, requiring a showing that the issue "could not have been raised."[177] Apparently, this means that "as long as it was possible to raise the argument" in the first application, the claim may not be raised in a second quest for post-conviction relief.[178]

On the other hand, the interests of justice may require a court to entertain a second application in light of the "unique facts" presented in a particular defendant's case.[179] Furthermore, as with any broad rule, several exceptions clearly exist. The first clear exception involves cases in which trial counsel also represents the applicant in the first post-conviction proceeding. In *Carter v. State*[180] the applicant maintained in a second application for post-conviction relief that he had been denied the effective assistance of trial counsel and that this issue previously "could not have been raised" because his trial

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174. Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989).

175. Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

176. *See* S.C. CODE ANN. § 17-27-90 (Law. Co-op. 1985). However, if the court voluntarily dismissed the first application without a specific finding of prejudice, a second application will not be deemed successive because the applicant, under those circumstances, has never had his "one bite at the apple." *See* Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989).

177. *Aice*, 305 S.C. at 450, 409 S.E.2d at 394.

178. *Id.*

179. *E.g.*, Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982) (per curiam).

180. 293 S.C. 528, 362 S.E.2d 20 (1987).

counsel was also his counsel for his first PCR application.[181] Because of the continued representation, and because Mr. Carter had not been apprised of the consequences of proceeding with trial counsel, the court reviewed the merits of his claims and granted post-conviction relief.[182] The court also established the following procedure:

> [H]ereafter, when applicants appearing at hearings on post-conviction relief are represented by their trial counsel, the court shall examine the applicant concerning the waiver of the issue of ineffective assistance of counsel.
>
> The court shall advise the applicant that the dual representation will result in the waiver of any claim of ineffective assistance of counsel. The applicant shall then state on the record whether he wishes to proceed, thereby waiving the issue.[183]

Another exception to the successive application rule exists if the applicant was denied the right created by the UPCA to appeal the denial of post-conviction relief.[184] In *Austin v. State*[185] the court held that if the applicant requested and was denied an opportunity to seek appellate review, or was not apprised of and thus did not knowingly waive the right to appeal, then he would be entitled to appropriate relief.[186] Apparently, this relief would consist of a new appeal to the South Carolina Supreme Court.

Furthermore, an applicant may also be able to demonstrate that the issue could not have been raised due to circumstances beyond the applicant's control, or as the United States Supreme Court stated in dealing with similar situations involving second federal habeas petitions, because of an objective factor external to the defense.[187] For example, such an objective factor could be that government interference or the reasonable unavailability of the factual basis of the claim impeded counsel's ability to raise the claim.[188] Finally, a defendant may be able to demonstrate that the court's refusal to hear the claim would constitute a "gross miscarriage of justice."[189]

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181. *Id.* at 529, 362 S.E.2d at 21.

182. *Id.* at 530, 362 S.E.2d at 21 ("[A]bsent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.").

183. *Id.* at 530, 362 S.E.2d at 22.

184. *See* Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

185. *Id.*

186. *Id.* at 454, 409 S.E.2d at 396.

187. McClesky v. Zant, 499 U.S. 467, 497, 111 S. Ct. 1454, 1472 (1991).

188. *See* McClesky v. Zant, 499 U.S. 467 (1991).

189. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

IV. STATE HABEAS CORPUS

A. Introduction

Habeas corpus, as defined by the common law, is protected by the South Carolina Constitution, which declares in Article I, § 18 that "[t]he privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of insurrection, rebellion, or invasion, the public safety may require it."[190] Without this constitutional protection, habeas would probably not have survived the enactment of the UPCA, which purports to take "the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence."[191] With the constitutional protection, the writ and the common law giving it substance take on the status of state constitutional law.

Although the UPCA now clearly exceeds habeas in importance in South Carolina,[192] the writ continues to be used.[193] The procedural rules governing its use are set forth in Rule 65 of the Civil Procedure Rules, and by statute at Section 17-17-10 through Section 17-17-200 of the South Carolina Code. However, neither the rules nor the statute defines the substance of habeas corpus. To discover the nature of the grounds for which the writ will issue, one must look to the interpretive case law.

B. Modern State Habeas Corpus

The history of habeas corpus in South Carolina was set forth in some detail in section II of this article.[194] After the 1969 enactment of the UPCA, state courts continued to adjudicate habeas cases in significant numbers, as the bar adjusted to the new remedy, and as the petitions filed prior to 1969 worked their way through the system. At first, the court treated these cases as if the UPCA did not exist and continued to develop the old remedy.[195]

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190. S.C. CONST. art. I, § 18. In Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1936), the unlikely question of what constituted an insurrection was litigated after the Governor declared a state of insurrection to force the State Highway Commissioners out of office.

191. S.C. CODE ANN. § 17-27-20(b) (Law. Co-op. 1985).

192. WILKES, *supra* note 32 at 914, 917.

193. Among the more important post-UPCA habeas cases are: Butler v. State, 302 S.C. 466, 397 S.E.2d 87, *cert. denied*, 498 U.S. 972 (1990); Yates v. Aiken, 301 S.C. 214, 391 S.E.2d 530 (1989), *rev'd*, 500 U.S. 391 (1991); Crowe v. Leeke, 273 S.C. 763, 259 S.E.2d 614 (1979).

194. *See supra* notes 8-72 and accompanying text.

195. *See* Watson v. Leeke, ___ S.C. ___, 194 S.E.2d 128 (1973) (per curiam) (petitioner unsuccessfully alleged involuntary guilty plea); Richards v. Crump, 260 S.C. 133, 194 S.E.2d 575 (1973) (legality of sentence under jurisdictional theory of habeas); Calloway v. Leeke, 256 S.C. 167, 181 S.E.2d 481 (1971) (denial of preliminary hearing under jurisdictional theory, right to counsel constitutional claim), *cert. denied*, 405 U.S. 923 (1972).

The most important of these cases was *Williams v. Leeke*,[196] in which the court held cognizable in habeas three new constitutional claims concerning: (1) evidence which is the product of an illegal search; (2) evidence which is the product of an illegal arrest; and (3) the right to confrontation of adverse witnesses.[197]

Eventually the court stopped developing its habeas jurisprudence and began treating habeas claims as if they were misnamed UPCA claims.[198] Soon after this shift, habeas petitions largely vanished. In fact, the words "habeas corpus" appear in only three reported cases for 1975,[199] and only in one case in 1976.[200] In large part, the explanation for this decline may have been perpetuated by the court's remark in *Finklea v. State*,[201] that the UPCA is designed to incorporate all rights available in federal habeas corpus.[202]

However, in the last few years, habeas has undergone a minor but limited renaissance. The most significant recent decision outlining the scope of habeas is *Butler v. State*.[203] In *Butler*, a capital case, the petitioner filed a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court after exhausting his available state post-conviction and federal habeas corpus remedies.[204] In his state habeas petition, Butler raised several claims that had not previously been presented to any court. The South Carolina Supreme Court granted the writ and ordered a new trial, holding that several of its prior decisions finding a violation of the Fifth Amendment right against self-incrimination should be applied retroactively in Mr. Butler's case.[205] The court opined that the "'the great and central office of the writ

196. 257 S.C. 104, 184 S.E.2d 441 (1971).

197. *See id.* at 109-11, 184 S.E.2d at 443.

198. *See* Creel v. State, 262 S.C. 558, 206 S.E.2d 825 (1974); Peyton v. Strickland, 262 S.C. 210, 203 S.E.2d 388 (1974).

199. *See* Russell v. Cooper, 263 S.C. 526, 211 S.E.2d 655 (1975), *cert. denied*, 423 U.S. 848 (1975); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975); State *ex rel.* McLeod v. Court of Probate, 266 S.C. 279, 223 S.E.2d 166 (1975) (per curiam).

200. State v. Lawrence, 266 S.C. 423, 223 S.E.2d 856 (1976) (per curiam).

201. 273 S.C. 157, 255 S.E.2d 447 (1979).

202. *Id.* at 158, 255 S.E.2d at 447-48. However, habeas did remain available to prisoners as a means of challenging conditions of confinement. *See* Crowe v. Leeke, 273 S.C. 763, 259 S.E.2d 614 (1979). Furthermore, in Stichert v. Heath, 286 S.C. 456, 334 S.E.2d 282 (1985) (per curiam), the petitioner used a habeas challenge in an attempt to resist extradition to Texas.

203. 302 S.C. 466, 397 S.E.2d 87 (1990).

204. *See* Butler v. McKellar, 494 U.S. 407 (1990).

205. *See* State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986) (per curiam), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), *overruled on other grounds by Torrence*; State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). In *Cooper*, *Pierce*, and *Gunter*, the same trial judge who presided over Butler's trial made comments that, in the court's view, "violated the defendant's

of habeas corpus is to test the legality of a prisoner's current detention.'"[206] While noting that Butler sought to invoke legal principles recognized after his trial, appeal, and state post-conviction remedies were complete, the court emphasized "that not every intervening decision, nor every constitutional error will justify issuance of the writ."[207] Rather, the writ will issue only under circumstances where there has been a "'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'"[208] Since *Butler*, the Court has made clear that it envisions habeas corpus to be a means of correcting a fundamental miscarriage of justice after a prisoner has exhausted all other available remedies.[209]

V. MOTION FOR NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE

This particular remedy encompasses claims based on the presentation of evidence that was not known to exist at the time of trial, if the newly discovered evidence reflects upon the defendant's innocence or the defendant's moral culpability in capital cases. Although somewhat frowned upon by the South Carolina Supreme Court,[210] a motion for a new trial based on after-discovered evidence remains a viable remedy in this state.

A. What is After-Discovered Evidence?

The term "after-discovered evidence" refers to evidence which existed at the time of trial, but of which the defendant was "excusably ignorant."[211] In *State v. Haulcomb*,[212] the court held that evidence supporting the defendant's theory that he had been entrapped was "after-created evidence," not

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[F]ifth [A]mendment rights by coercing him to take the witness stand in his defense." *Butler*, 302 S.C. at 467, 397 S.E.2d at 87.

206. *Butler*, 302 S.C. at 468, 397 S.E.2d at 88 (quoting Walker v. Wainwright, 390 U.S. 335, 336 (1968) (per curiam)).

207. *Id.*

208. *Id.* (quoting State v. Miller, 84 A.2d 459, 463 (N.J. Super. Ct. 1951), *cert. denied*, 342 U.S. 934 (1952) (emphasis provided in *Butler*)).

209. State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring) ("[A]n imprisoned individual may obtain a writ of *habeas corpus* from this Court after exhausting all other sources of relief," if he can satisfy the *Butler* standard.); *see also* Drayton v. Evatt, ___ S.C. ___, 430 S.E.2d 517, 520 n.2 ("This is not to say that a defendant who has exhausted his opportunities for review on direct appeal and post-conviction relief is completely without a remedy" because he can still seek a writ of habeas corpus under some circumstances.), *cert. denied*, 114 S. Ct. 607 (1993).

210. *See* State v. Augustine, 131 S.C. 21, 126 S.E. 759 (1925).

211. State v. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606, *appeal dismissed*, 414 U.S. 886 (1973) (citing United States v. Bensen, 142 F.2d 232 (9th Cir. 1944)).

212. 260 S.C. 260, 195 S.E.2d 601 (1973).

after-discovered evidence. The distinguishing factor was that the evidence on which the defendant relied—evidence that other individuals had been induced to commit a similar crime by the same officer who had allegedly entrapped the applicant—had not yet occurred at the time of Mr. Haulcomb's trial.[213] Thus, while after-discovered evidence may only become manifest after trial, it must have existed at that time, but nevertheless remained undiscoverable.[214]

B. The Elements of the Motion

In 1954 the South Carolina Supreme Court decided that for a defendant to receive a new trial, the defendant must first make a *prima facie* showing that such a new trial is warranted.[215] This is established by demonstrating that the evidence:

1) would probably change the result if a new trial is had;[216]

2) has been discovered since the trial;[217]

3) could not have been discovered before trial;[218]

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213. *See id.* at 270, 195 S.E.2d at 605.

214. *See id.*

215. *See* State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954); *see also* State v. Butler, 261 S.C. 355, 200 S.E.2d 70 (1973); State v. Jennings, 40 S.C. 553, 18 S.E. 932 (1984) (both cases maintaining the requirements of *Clamp*).

216. State v. Jones, 185 S.C. 274, 276, 194 S.E. 11, 12 (1937). This element of the after-discovered evidence test was most recently discussed in State v. South, ___ S.C. ___, 427 S.E.2d 666 (1993). In *South*, the court reversed the trial judge's decision granting Mr. South, a death sentenced inmate, a new sentencing trial on the basis of after-discovered evidence that he had an undiagnosed brain tumor at the time the offense was committed. On the basis of the newly discovered evidence, the trial judge concluded that "there is a *significant possibility* that the outcome of the sentencing *could* have been different." *Id.* at ___, 427 S.E.2d at 670 (quoting the trial judge). In the court's view, this was not the legal equivalent of the "probably would change the result" test, and it remanded the case for reevaluation under the correct standard. *Id.*

217. The rationale for this requirement was articulated in *Jones*, 89 S.C. 41, 71 S.E. 291 (1911), wherein the court concluded that "[t]o permit one on trial to hold back evidence which he may have in his possession, or which he failed to use due diligence to obtain, and then use it as the grounds of a motion for a new trial in the event of an adverse verdict, would be destructive of the efficient administration of justice, and subversive of the rule that it is to the interest of society to have an end to litigation." *Id.* at 49, 71 S.E. at 294.

218. *Jones*, 185 S.C. at 276, 194 S.E. at 12. This aspect of the test imposes a due diligence standard on counsel. *See* State v. Norris, 285 S.C. 86, 96, 328 S.E.2d 339, 345 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Kelly, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985) ("A requisite for the grant of a new trial leased on after-discovered evidence is that the evidence could not have been discovered with due diligence before the first trial."). In State v. Edens, 272 S.C. 130, 250 S.E.2d 116 (1978), a

4) is material to the issue of guilt or innocence;[219] and,

5) is not merely cumulative or impeaching.[220]

The petitioner must satisfy each element for the court to grant the motion.[221] Furthermore, although this standard appears relatively straightforward, the contours and scope of the various elements are rather uncertain and vary widely on a case by case basis. With one newly created exception for capital cases discussed below,[222] the court has consistently followed this standard.

C. When Must the Motion be Filed?

The provisions of Rule 29(b) place no time limitations on a motion for new trial based on after-discovered evidence, but do require that it be filed within a reasonable time after discovery of the evidence.[223] The Rule also

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forgery prosecution, the court held that counsel's failure to seek expert testimony from a document examiner prior to trial established a lack of due diligence. Thus, the defendant's claim that post-trial expert evidence showing the documents were not forged was held not to be after-discovered evidence. *Id.* at 134-35, 250 S.E. 2d at 118. Similarly, in State v. Allen, 276 S.C. 412, 279 S.E.2d 365 (1981), the court held that "the theory of after-discovered evidence does not extend to evidence available or attainable from public record before the time of trial" because "matters of public record were available to a diligent defendant." *Id.* at 414, 279 S.E.2d at 366; *see also* State v. Fowler, 264 S.C. 149, 213 S.E.2d 447 (1975) (holding that defendant's failure to secure testimony of person claiming to have committed defendant's crime was failure of ordinary diligence).

219. *Jones*, 185 S.C. at 276, 194 S.E. at 12. Part of the materiality standard is whether the evidence would be admissible at a retrial. In Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983), for example, the court concluded that because the after-discovered evidence was hearsay from an admitted liar, thief, and drug dealer, it was unlikely to effect the outcome of a new trial. *Id.* at 612, 299 S.E.2d at 856.

220. *Jones*, 185 S.C. at 276, 194 S.E. at 12; State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979), *cert. denied*, 444 U.S. 1012 (1980). In *Caskey*, the Court held that evidence regarding an undisclosed deal between the state and a state's witness was "at most merely impeaching of [the witness's] credibility and not material to appellant's guilt or innocence." *Id.* at 330, 256 S.E.2d at 739. *See* State v. Wells, 249 S.C. 249, 262-64, 153 S.E.2d 904, 911-12 (1967). Similarly, in State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), *overruled by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the court determined that evidence regarding the victim's history of prostitution was cumulative to that presented by other witnesses. *Id.* at 96, 328 S.E.2d at 345.

221. *See Hayden*, 278 S.C. at 611, 299 S.E.2d at 855.

222. *See infra* text accompanying notes 223-27.

223. S.C. R. CRIM. P. 29(b) provides:

> A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence; provided, however, that a motion for a new trial based on after-discovered evidence may not be made while

gives the circuit judge jurisdiction to entertain this motion despite the end of the particular term of court if the case is not presently before the appellate court.[224]

D. Miscellaneous Procedural Requirements

First, the motion must be supported by affidavits and, if available, other relevant evidence. The moving party must also submit a personal affidavit supporting the motion, declaring "that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence."[225] Second, the burden of proof as to each element of the five part test is on the moving party.[226] Third, whether to grant the motion is placed within the discretion of the trial judge, who has the obligation to resolve any conflicts in the evidence.[227] And, as a corollary matter, the trial court's decision will not be reversed on appeal unless the defendant can demonstrate that the trial judge abused its discretion.[228]

E. The Applicability of After-Discovered Evidence in Capital Cases

Historically, the motion has been used in instances where a new trial was sought because the after-discovered evidence was relevant to the defendant's guilt or innocence. In *State v. South*,[229] however, the South Carolina Supreme Court, for the first time, was asked to consider whether the same five element standard[230] applied when the after-discovered evidence was relevant to whether the defendant should have been sentenced to death.[231] South

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the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

224. *Id.*

225. State v. DeAngelis, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971).

226. *See* Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

227. State v. Edens, 272 S.C. 130, 250 S.E.2d 116 (1978); *see* State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974).

228. *Pierce*, 263 S.C. 23, 207 S.E.2d 414; *see* State v. South, ___ S.C. ___, ___, 427 S.E.2d 666, 668 (1993) (holding that the trial court abused its discretion by relying on asserted after-discovered evidence which was immaterial to the appellant's guilt or innocence) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)), *cert. denied*, 444 U.S. 1012 (1980).

229. ___ S.C. ___, 427 S.E.2d 666 (1993).

230. *Id.* at ___, 427 S.E.2d at 668.

231. *Id.* at ___, 427 S.E.2d at 669. South argued that the evidence was relevant to the question of innocence because, as supported by the testimony of a psychiatrist, the effects of the tumor, exaggerated by his alcohol consumption, rendered him legally insane. However, the court

maintained that evidence that he had a brain tumor at the time of the offense, which went undiscovered due to the fact that a radiologist misread a computerized axial tomography (CT) scan conducted prior to trial, was after-discovered evidence warranting a new sentencing trial. The court held that the same standard previously discussed applied with one modification: "the newly discovered evidence must be material to any mitigating or aggravating circumstances," as opposed to the defendant's guilt or innocence.[232] The court then remanded the case so the correct standard could be applied.[233]

VI. CONCLUSION

In this article, I have attempted to provide an overview of the various post-conviction remedies available to incarcerated persons in South Carolina. However, any remedy is only as effective as the advocate who utilizes it, and the substance of the claims the advocate brings to the court's attention. In turn, this requires both a post-conviction system that provides both adequate time and resources for the factual and legal development of available grounds for relief and a more skilled post-conviction bar.[234] In this very real sense, the concerns giving rise to the modern remedies have gone unrealized, and, unfortunately, post-conviction relief remains the "red-headed stepchild" of the state's legal system.

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determined that the psychiatrist's conclusions were not in accord with South Carolina law because voluntary intoxication does not relieve a defendant from criminal responsibility. *Id.* at ___, 427 S.E.2d at 669.

232. *Id.* at ___, 427 S.E.2d at 670. S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1976 & Supp. 1993) sets forth the aggravating and mitigating circumstances that a judge or jury may consider in a capital trial in South Carolina.

233. *South,* ___ S.C. at ___, 427 S.E.2d at 670.

234. Cowden, *supra* note 1, at 420.